

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X  
UNITED STATES OF AMERICA : 13-CR-607

-against- US District Court  
PHILLIP KENNER and Central Islip, NY  
TOMMY CONSTANTINE,

September 2, 2014  
1:50 pm

Defendants.:

- - - - - X  
TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Call to Order of the Court. Appearances noted  
as indicated above.)

3                           THE COURT: Both Mr. Kenner and Mr. Constantine  
4 are present.

As you know, we scheduled this as a status conference. And, in addition to being cc'd on various discovery letters, I did receive the government's August 29 letter raising at least two outstanding discovery issues. So we can address those and any other issues that anyone wants to bring up.

11                   Why don't we start with the two issues raised in  
12 the letters. I don't know if Mr. Conway or Mr. Haley  
13 wants to explain what the issue is.

14 MR. HALEY: I would be happy to, your Honor.

15                   When you say the two issues, are you speaking of  
16 the issue regarding the desire that my client have  
17 returned to him his laptop computer?

18                   THE COURT: That is one. And the other one is  
19 seeking the identification of the victims who were named  
20 in the indictment. Those are the two that the government  
21 highlighted.

22 | MR. HALEY: Yes, judge.

23 By way of, I guess, background, your Honor, I  
24 know your Honor makes a point of staying on top of every  
25 case. If your Honor has reviewed the docket sheet since

1 our last appearance in court, because there are a number  
2 of Rule 16 demands on my part that I will address in a  
3 moment because I know that is not the focus of your  
4 Honor's current question, there was, as indicated in this  
5 correspondence between myself and the government, an issue  
6 we were trying to resolve as related to the information  
7 contained on my client's laptop computer which was seized  
8 pursuant to a search warrant.

9 As reflected in that correspondence, I had  
10 proposed a solution by which the laptop would be returned  
11 to my client: I would agree to a broadly based  
12 stipulation to resolve any issues that may arise in  
13 connection with the evidentiary use of the information  
14 contained on that laptop.

15 I suggested that early on, after our last court  
16 appearance, because, as I recall, when I brought the issue  
17 to the attention of your Honor, your Honor suggested that  
18 we work cooperatively with the government to try to  
19 resolve the issue.

20 As set forth in one of my letters, I did make  
21 efforts to try to come up with a solution by which the  
22 government retain the laptop computer and I would be able  
23 to then, through the use of an expert witness, obtain a  
24 model laptop computer, the same model number, the same  
25 software program, to try to take the burden on, judge, if

1    4  
2 you will. When I say take the burden on: for the defense  
3 to solve the problem if we are not going to be given the  
4 laptop computer.

5    4  
6 Judge, really that is academic from my  
7 standpoint because I believe the issue has changed. I  
8 believe the issue has changed as a result of a decision  
9 rendered by the Second Circuit in June of this year. That  
10 decision is entitled *United States v Galias*, 755 F.3d 125.  
11 And it was actually a decision which I believe, judge,  
12 really addresses this issue.

13    4  
14 It was not based upon a Rule 16 discovery  
15 request for return of an original laptop computer or, if  
16 you will, the information contained on the original laptop  
17 computer by way of a Rule 16 discovery demand, but by way  
18 of a Fourth Amendment analysis.

19    4  
20 The point is simply this, Judge. If the court  
21 takes a look at *Galias*, what we have is a circumstance  
22 where the agents went into the location with the  
23 authority, pursuant to a search warrant, to seize  
24 information contained on a computer.

25    4  
26 What they did at the location, judge, is, they  
27 mirror-copied the hard drive of that particular computer;  
28 left the computer with the defendant, it was his computer,  
29 but mirror hard-copied the information contained on the  
30 computer, which contained information arguably relevant to

1       the prosecution but also contained a great deal of  
2       personal information.

3                  The government held on to that information for  
4       an extended period of time though there were requests that  
5       information of a personal nature be returned to the  
6       defendant. The government didn't do so.

7                  It went up to the Circuit, and the Circuit found  
8       that under those circumstances there was a Fourth  
9       Amendment deprivation; that the government had no  
10      authority, by way of constitutional law or by way of  
11      statutory law, to retain all that information in its  
12      possession.

13                 Judge, what I think is salient in that decision,  
14       because there absolutely has been a dispute between myself  
15       and the government as to whether or not they are really  
16       prejudiced; if they return the laptop computer to my  
17       client, I respectfully submit to your Honor I'm not a  
18       computer expert but they have made a mirror copy of this  
19       hard drive.

20                 They have all the information already in their  
21       possession by virtue of making that mirror hard copy of  
22       the hard drive. As a matter of fact, some Rule 16  
23       material we received to date has come off of that hard  
24       drive from that laptop computer.

25                 What the Circuit had to say is as follows.

1       *"Today, advancements in technology enable the government*  
2       *to create a mirror image of an individual's hard drive,*  
3       *which can be searched as if it were the actual hard drive*  
4       *but without interviewing with the individual's use of his*  
5       *own computer or files."*

6              So the current application, Judge, from my  
7 position, is really quite simple. This computer, laptop  
8 computer, contains the information arguably relevant to  
9 the prosecution of the case. There is no question it also  
10 contains personal information, a great deal of personal  
11 information, as relates to my client. That item, the  
12 laptop itself, in view of the fact that the government has  
13 already obtained the information they need by way of the  
14 hard drive, ought to be returned to my client.

15              I might add, judge, it is also our position that  
16 not only should his laptop be returned but his iPhone  
17 should be returned.

18              Through the Rule 16 discovery we have received  
19 snippets of emails that the government has provided to us  
20 that have come off of the iPhones. The iPhone also  
21 contains significant amounts of personal information.  
22 They are obviously able to copy electronically the  
23 information contained on those documents.

24              Judge, I might add we are talking about the  
25 Federal Bureau of Investigation. We are talking about a

1 law enforcement agency that has the technical wherewithal  
2 as well as the financial wherewithal to engage the experts  
3 to get a mirror hard drive of that laptop, which they have  
4 already obtained.

5 THE COURT: Okay. I understand that issue.

6 I want to ask the government to speak to that.  
7 But do you want to cover the second issue as well, the  
8 victim-identification issue?

9 MR. HALEY: Yes, sir.

10 I cited in an earlier email to the government  
11 two cases, Second Circuit cases, wherein the Circuit by  
12 way of a demand for a bill of particulars deemed it  
13 appropriate to identify the names and addresses of --  
14 excuse me. Yes, actually it was the names and addresses,  
15 I believe, of the victims in a particular case.

16 Those two cases indicated that the vehicle by  
17 which such a demand could be made was a demand for a bill  
18 of particulars. I stylized my letter in terms of that  
19 type of demand, the demand for a bill of particulars.  
20 Judge, because there is a reality here, and I understand  
21 that reality. I mentioned it in my letter. We may have  
22 already identified each of the John Does.

23 For purposes of the record, judge, from our  
24 perspective, judge, Brian Berard is John Doe One.

25 Michael Pecca is John Doe Two.

1                   Owen Nolan is John Doe Three.

2                   Darrell Sidor is John Doe Four.

3                   Glen Murray is John Doe Five.

4                   Sergei Gonchar is John Doe Six.

5                   Mattias Norstrom is John Doe Seven.

6                   Steven Rucchin is John Doe Eight.

7                   Joe Juneau is John Doe Nine.

8                   Greg DeVires, John Doe Ten.

9                   Jay McKee is John Doe Eleven.

10                  Ethan Moreau is John Doe Twelve.

11                  Tyshon Nash is John Doe Thirteen.

12                  John Kaiser, who is present in court, Judge, he  
13                  is seated in the second row, has been here for each court  
14                  appearance, he is certainly entitled to be so, he is here,  
15                  he is John Doe Fourteen.

16                  Nick Privitelo is John Doe Fifteen.

17                  Kenneth Jowdy is John Doe Seventeen (sic).

18                  Vincent Tesorio is John Doe Eighteen.

19                  Now, to the extent that the government is  
20                  prepared to acknowledge that we have correctly identified  
21                  the John Does for purposes of my representation as to who  
22                  we believe the John Does is to be, if they can make that  
23                  representation to the court, this becomes less of an issue  
24                  but not entirely, and I will get to that in a moment.

25                  Judge, there is going to be a point in time when

1 I am going to have to open up to a jury. I will be using  
2 allegations that are contained in that indictment when I  
3 speak to that jury, and I want to be able to say to the  
4 jury and identify each of these John Does so the jury is  
5 not left with some shell game in their mind as to who  
6 specifically alleged what on what occasion with respect to  
7 the multiple counts obtained in that indictment.

8 I might add, Judge, the reason I mention these  
9 names to your Honor is, we have been in possession of  
10 those names for some period of time. If there is any  
11 allegation whatsoever that there has been an effort on my  
12 part, on the part of an investigator employed by us, on  
13 the part of my client, to in any way intimidate these  
14 witnesses such that we are looking for them to suborn  
15 perjury or anything of that nature at trial: Absolutely  
16 not.

17 And I would like to say, Judge, this is not an  
18 organized crime case. This is not an MS-13 case. But it  
19 has relevance and materiality that the defendant be  
20 allowed to know specifically who his, if you will,  
21 accusers are as relates to each John Doe as listed in that  
22 indictment.

23 I might add, judge, that certainly as far as Mr.  
24 Kaiser is concerned, he is not worried about his personal  
25 safety. He has given interviews to the news media, both

1 he as well as Brian Berard, alleging my client stole money  
2 from them, making all sorts of allegations. So they bask  
3 in the spotlight of the press, and yet can it truly be  
4 argued that somehow revealing the names or confirming the  
5 names to the defense in this action is somehow put them in  
6 jeopardy?

7                   The final reason, Judge, it is important to me,  
8 and it will become an issue, judge, it is our intent at  
9 the appropriate time to serve Rule 17 subpoenas. As I  
10 indicated in one of my letters to the government, it  
11 strikes me we don't need the address of all those John  
12 Does. We have pared down the list as to who we would be  
13 interested in serving Rule 17 subpoenas on.

14 As your Honor is well aware, I'm CJA counsel.  
15 These subpoenas would be presented to your Honor for  
16 review. They are presented to the marshals service for  
17 service. In an effort to move this case along, judge, it  
18 strikes me that it is only appropriate that we have  
19 accurate addresses so we don't waste time and these  
20 subpoenas get served to have marshals service come back to  
21 your Honor and then ultimately me say: Look. He is no  
22 longer at that address.

23 So this has relevance and materiality, judge, in  
24 connection with the preparation of the defense in terms of  
25 the Rule 17 material.

1           I believe those are the two issues, your Honor.

2           THE COURT: All right. Let me deal with those  
3 and then I will address any other ones.

4           Do you want to add anything to that?

5           MR. CONWAY: No, judge. Just that in terms of  
6 the computer, I am not joining in that motion.

7           But in terms of the John Does, we join in Mr.  
8 Haley's motion.

9           THE COURT: Does anyone want to address those  
10 two issues?

11           MR. MISKIEWICZ: Yes, your Honor.

12           Your Honor, as to the issue of returning the  
13 laptop at this time. I will just, in summary, say that  
14 this is not the *Ganias* case. In that case the government  
15 was in possession of a laptop for two and a half years.  
16 It was in the process of or actually sought a second  
17 search warrant that expanded what it was able to view in  
18 that receptacle of data. And that is really the narrow  
19 issue that the Second Circuit had to address, is whether  
20 or not the seizure arguably took place at a later time as  
21 opposed to an earlier tame.

22           Here the laptop has been in our possession for a  
23 number of months. More importantly to the government's  
24 prosecution team, we haven't even gotten possession of it.  
25 We have not even begun the Rule 41E search of documents

12

1 because the Sixth Amendment concern that there are  
2 privileged documents on that receptacle of data, if you  
3 will, that box full of documents, may contain privileged  
4 information that frankly we shouldn't be able to see and  
5 maybe even the codefendant Mr. Constantine shouldn't be  
6 able to see.

7           We have been working through that as  
8 expeditiously as possible. There is a walled-off group of  
9 agents and an AUSA supervising that, and I'm advised that  
10 that review has found something like 60,000 files  
11 totalling something like 300,000 pages of documents, and  
12 they are working as quickly and in as good faith as  
13 possible, as expeditiously as possible, to finish that  
14 review. But that never was an issue in the *Ganias* case,  
15 and here it is.

16           Secondly, we don't have one defendant, as in the  
17 *Ganias* case. We have two. So although it may be the case  
18 that Mr. Haley and his client are prepared to offer some  
19 broad stipulation, I don't know how Mr. Conway and his  
20 client can offer the same stipulation as to authenticity  
21 and maybe even waive objections to foundation arguments  
22 when they, like the prosecution team, haven't even been  
23 able to see what it is that we purport is relevant and  
24 seized pursuant to that search warrant.

25           Finally, and I think this is critical, many of

1 the issues that Mr. Haley is complaining about, overbreath  
2 or personal documents, et cetera, I submit will probably  
3 get resolved as a part of this privilege review.

In other words, the privilege team will submit to Mr. Haley, and I believe to the court simultaneously, a list of files that they believe are not privileged and therefore discoverable to the prosecution and discoverable to Mr. Constantine. There may be other documents where there will have to be some differences of opinion, and ultimately the court will have to decide. And I think that that will be the appropriate time for Mr. Haley to say the government should under no circumstances view the following. And that will forever more resolve the issues in *Ganias* about overbreadth of the warrant.

15                   THE COURT: In terms of solving this issue about  
16 his access to it, in your letter there is reference to him  
17 getting a computer through the national litigation support  
18 office. Is that your proposal for what the solution  
19 should be?

Even if they don't give him back the original hard drive, obviously Mr. Haley and his client want to have access to what is on there and are having issues I guess with what is being provided to them.

24 MR. MISKIEWICZ: That issue seems to have  
25 morphed, if you will, over the last several days and, to

1 my knowledge, since the last status conference.

2                   First of all, it was our understanding that Mr.  
3 Haley would be unable to view the documents that we turned  
4 over in the mirror-imaged format because they were created  
5 on an Apple system and they only have access to a  
6 Microsoft system. Apparently, that is not the case.

7                   Also, apparently he has the ability to view that  
8 material. In fact, I'm advised that our privilege-review  
9 team is reviewing all of this material on a Microsoft  
10 system. We don't have Apple in the government.

11                  So there doesn't seem to be this inability to  
12 cross over platforms. If that were simply the case, that  
13 would certainly be a problem and I would understand his  
14 need to see the original. But apparently, I have  
15 confirmed with Mr. Haley, he was able to finally locate  
16 whatever software it was that was necessary to review  
17 certain documents. Some of the documents, I'm told again  
18 from the privilege review, are PDF files and Microsoft  
19 Word files.

20                  So if it is a matter of actually seeing the  
21 documents, giving back the original evidence is not  
22 necessarily the only solution. If it is a matter of  
23 preserving the evidence, however, I submit that there is a  
24 process of going through it deliberately, and maybe we  
25 will get to a point where we can turn over the original

1 back to Mr. Haley.

2           But I submit, your Honor, we are not there now.

3           And once we turn it over, I don't know how your Honor  
4 enters a protective order that says Mr. Kenner cannot  
5 touch it, or at least one that is enforceable. And if  
6 that is the case, we may have a situation, and this is  
7 also principally our reason for being hesitant about  
8 merely turning over an original piece of evidence; there  
9 may be items there that cannot be reconstructed through  
10 the image copy. I'm told, for instance, the mirror copy  
11 does not have the application software that is in the  
12 original, and there may come a time when that application  
13 software, particularly having to do with forged documents  
14 and forged texts, might become critical.

15           It is also the case that, and I have had this  
16 experience in lots of complex litigations where documents,  
17 once copied and recopied, become corrupt. And although it  
18 is easy at this stage for Mr. Haley to say just give it  
19 back and we will deal with the problems as they arise  
20 later on with some all-encompassing stipulation, again  
21 cocounsel and codefendant may not agree, and if there is a  
22 document on that hard drive that Mr. Constantine recalls  
23 that doesn't turn up on a mirror image, we no longer have  
24 the original to look at and now we are into an issue of  
25 spoliation and Sixth Amendment concerns of destruction of

1       Brady evidence.

2                   So for all those reasons, your Honor, I simply  
3       ask the court's indulgence again to allow us to go through  
4       this process.

5                   THE COURT: How much longer is the privilege  
6       review process? Do you know?

7                   MR. MISKIEWICZ: I'm advised that they should  
8       have, if not by the end of the month certainly by October  
9       15, a list to counsel about what they deem to be  
10      privileged or not privileged.

11                  THE COURT: Okay. Can you move now to the  
12      victim-identification issue.

13                  MR. MISKIEWICZ: Just very briefly. We are  
14      unsure as to whether or not this is a bill of particulars,  
15      and if it is, clearly counsel has articulated a number of  
16      names which would suggest he doesn't need a bill of  
17      particulars. He claims he knows who those individuals  
18      are. So therefore the next question is whether or not  
19      this is something that would be, or additional  
20      documentation that would be, discoverable under Rule 17C,  
21      and the Bowman Dairy and Nixon standards would have to  
22      come into play. And at that point we would like to be  
23      able to, at the very least, be able to put in that counsel  
24      is seeking to subpoena from individuals that he believes  
25      to be witnesses in this case.

1           There is no question at some point the John Does  
2 are going to be identified to the jury and to cocounsel  
3 and to the court. There will be 3500 material that will  
4 make it plain. But we are a long ways away from that.  
5 And putting, just contending that I need this because of,  
6 on the grounds of a bill of particulars, without even  
7 arguing or filing a motion or application to the court  
8 which we would have an opportunity to respond to and then  
9 saying: *Well, what we really want is a Rule 17 subpoena,*  
10 makes it impossible for us then to really respond I think  
11 in any meaningful way.

12           THE COURT: Let me say --

13           MR. MISKIEWICZ: I would suggest that if he  
14 wants to file a bill of particulars, he should be given a  
15 filing schedule to do so. Or if there is a subpoena that  
16 he seeks documentary evidence from various individuals,  
17 that also be given the opportunity to join the issues  
18 after seeing if it is discoverable.

19           THE COURT: There are two issues here.

20           To the extent that he is seeking a Rule 17  
21 subpoena for additional documents from any of the victims,  
22 I agree with you, obviously he would have to do that by  
23 formal motion and I would have to see exactly what he is  
24 seeking.

25           But to the extent he is seeking a more basic

1       List of the names of the victims, forget about their  
2       addresses for now because that would be contingent upon  
3       whether or not there is any basis to subpoena for  
4       anything, or whether or not they would not accept service  
5       absent being given their addresses.

6           But just a list of names, I guess I don't  
7       understand. I can make them file a motion for a bill of  
8       particulars on that. But it is clear to me that he would  
9       be entitled to those names prior to the trial and that the  
10      only basis for withholding them even at this juncture  
11      would be if there was a safety reason to do that, at which  
12      time I would set a date by which he would have to  
13      disclose, 30 days before we go to trial, 60 days before  
14      the trial; I don't know that what date would be.

15           But I don't know that this is one of those  
16       cases, for the reasons that I think Mr. Haley indicated,  
17       which are twofold. One is, part of your argument is they  
18       don't need the names because they have them already. So  
19       even if they have them already, then whatever safety issue  
20       you may be concerned about is moot.

21           But the second issue is that I don't know of any  
22       particular safety issues. I know you have summarized some  
23       conversations that the government said took place between  
24       Mr. Kenner and one or more of the victims, but I'm not  
25       sure that you have made a sufficient showing at this

1        juncture, with Mr. Kenner incarcerated, that that is a  
2        sufficient reason for me to delay disclosure of just the  
3        names so that they can begin preparing for the trial.

4              I don't want them to, if, say, you disclose this  
5        30 days before trial and they say Judge, that is not  
6        enough time, we need an adjournment of the trial because  
7        until we know who the victims are it is difficult for us  
8        to prepare. So this is the way I am looking at it. And  
9        to the extent they just want a list of names of the  
10       victims, unless the government is going to try to  
11       articulate to me a compelling basis for delaying that, I'm  
12       going to tell you that you should turn over that list now  
13       or confirm that the list that he just read off is  
14       accurate. If you want to, do that today in court. But  
15       you can't do this through a letter to him.

16              But to the extent that he is seeking their  
17       addresses or seeking any documentation from them, that he  
18       should do by formal motion. So I will leave the option  
19       of, if you want to argue that I should delay the  
20       disclosure of the names, you should submit a letter within  
21       one week of today explaining to me why we should do that.  
22       Otherwise, within one week of today the names should be  
23       turned over to counsel. Okay?

24              MR. MISKIEWICZ: Understood.

25              THE COURT: On the first issue, Mr. Haley.

20

1       First let me ask Mr. Conway.

2                  You are being drawn into the motion in terms of  
3                  whether or not you and your client would stipulate. I'm  
4                  not sure this is dispositive of the motion, but at this  
5                  point are you willing to stipulate to the authenticity of  
6                  anything the government recovers from the mirror image of  
7                  the hard drive?

8                  MR. CONWAY: I can't at this time, your Honor,  
9                  because I'm in the dark. I don't know what is on there.  
10                 Obviously, I haven't had an opportunity to see anything.  
11                 And until their review is done and I can see what is on  
12                 there, I can make certain decisions and make certain  
13                 challenges at that time, but at this time I can't make any  
14                 representation whatsoever.

15                 THE COURT: So Mr. Haley, I don't want to spend  
16                 too much time on this, but if you want to make a motion  
17                 for return of property, or however you want to style it,  
18                 you can do that. But I will say to you right now it seems  
19                 to me that, in light of the absence of a full stipulation  
20                 from everybody who potentially would be involved in the  
21                 documents that are recovered, and in light of the fact  
22                 that they are still doing a privilege review, that any  
23                 attempt to get a return of that computer would be  
24                 premature.

25                 I would be shocked if you can find any case

1 where, under those type of circumstances, the government  
2 has been required to return the original computer when  
3 there is not a full stipulation about the authenticity of  
4 it and they are still undergoing a privilege review. It  
5 seems very premature.

6           But let me ask you because now I'm confused.

7           Are you having issues accessing the mirror image or not?

8           MR. HALEY: Yes, your Honor.

9           If I may, and I will be brief. The issue, your  
10 Honor, and I anticipated your Honor may want it, and I  
11 would invite your Honor because it will be probably the  
12 only case I cite in my brief to the court, to take a look  
13 at that *Ganias* case that I cite, your Honor, on the record  
14 because I believe that clearly addresses the issue.

15           Judge, we are really just mixing apples and, I  
16 won't say oranges; we are mixing apples and PC-based  
17 computers here. The issue is this. We were delivered two  
18 terabyte hard drives which the government claims is a  
19 mirror image of the hard drives on my client's computer.  
20 It is those two terabyte hard drives that have been  
21 delivered to my client that, when he tries to access the  
22 information on the PC-based computers at the Queens  
23 Private Correctional facility, where he is incarcerated,  
24 he is unable to fully access that material. He can access  
25 some, I'm told, but a very small amount of it, probably

1 related to those PDF files which typically can be accessed  
2 whether you have an Apple or a PC-based computer.

3 THE COURT: So you are not having any trouble.  
4 In other words, you can review them. But it is a jail  
5 issue?

6 MR. HALEY: No, Judge. I do not physically have  
7 the two terabyte hard drive devices. I turned them over  
8 to my client. Why? Because they contain two terabytes of  
9 information.

10 He is actively involved in his defense. He  
11 reviews the material. Then we meet. I can take a look at  
12 what is relevant material. So he is the starting point  
13 for this Rule 16 material. And I do want to address that  
14 a moment, judge. That is the issue. The return of the  
15 laptop, not only do I believe is warranted under the  
16 Second Circuit case I sent to you; and, with all due  
17 respect to your Honor, I don't believe that the arguments  
18 that the government has advanced in any way undermine the  
19 principle as set forth, and I believe it is the clear  
20 direction that is set forth in the *Ganias* case, as to how  
21 a defendant, when the government's able to acquire, as  
22 they have here, mirror hard drives of the computer, under  
23 what circumstances must they return that computer, laptop,  
24 original laptop, to the defendant. And I believe it  
25 clearly sets that forth.

1           I don't want to belabor the point, judge. You  
2 want a brief filed? I would absolutely give your Honor  
3 the brief. I would respectfully suggest your Honor take a  
4 look at that decision.

5           So from my perspective, judge, the issue at this  
6 juncture is not whether or not the defense can or should  
7 engage in further efforts to obtain a computer that may or  
8 may not be able to access the terabyte hard drive. That  
9 is not the issue. He is entitled to his laptop back.  
10 *Ganias* says he is entitled to his laptop back. The  
11 government is protected because they have the mirror hard  
12 drive. The mirror hard drive in their possession allows  
13 them to conduct the privilege review, do everything they  
14 need to do, Judge, to address those issues because it is  
15 just that, a mirror hard drive. It is the same  
16 information.

17           So I made that point, your Honor. I believe I  
18 have perhaps made that point ad nauseam, judge, and I  
19 apologize to the court for doing that.

20           THE COURT: So you can file it at your  
21 convenience and I will look at it whenever it comes in.  
22 In the meantime, particularly in case Mr. Haley turns out  
23 to be incorrect, because I'm somewhat skeptical that it  
24 would be appropriate to return the computer at this  
25 juncture given what I have already outlined, I want the

1 government to look into it.

2 It seems to me that, given the critical role  
3 Mr. Kenner is playing in the review of the information,  
4 that Mr. Haley would be able to do that from his office.  
5 It doesn't assist him if Mr. Kenner can't do it from the  
6 jail.

7 So I don't know if you want to look into that  
8 issue or not, but I would ask that you find out why in  
9 that facility Mr. Kenner can't access and look at that  
10 that.

11 MR. MISKIEWICZ: No, your Honor.

12 THE COURT: Obviously, I have no reason to  
13 believe that what Mr. Kenner is telling his lawyer is  
14 inaccurate. The government should try to find out how  
15 they can address that within the jail by maybe bringing in  
16 additional equipment or a computer program, because that  
17 has to be addressed.

18 MR. MISKIEWICZ: Yes, your Honor.

19 THE COURT: Okay. So are there any other  
20 outstanding issues the defense wants to raise before we  
21 select another date?

22 MR. HALEY: Yes, your Honor. May I approach a  
23 moment, judge?

24 THE COURT: Yes.

25 MR. HALEY: Your Honor, in April of this year I

25

1       was appointed as substitute counsel for Mr. Kenner,  
2       Mr. Kenner having previously been represented by Randi  
3       Chavis of the Federal Public Defenders.

4                 Now, on my representation or appointment to  
5       represent Mr. Kenner, I did in relatively short order  
6       obtain the file from Miss Chavis; I think the same day,  
7       actually. I think before I appeared, I obtained her file  
8       because I was aware I was going to be appointed to  
9       represent Mr. Kenner.

10               At that point in time, judge, the government had  
11       delivered 20 disks of Rule 16 material. And these are  
12       computer disks, judge, the CD-ROM disks, that contain  
13       videos that contain recorded telephone calls, that contain  
14       bank documents, a myriad of Rule 16 material. I have a  
15       list of what they had provided by that date.

16               And indeed, Judge, it was on March 24, by way of  
17       letter to Miss Chavis, that they supplemented that with  
18       delivery of the two terabyte portable hard drives. That  
19       was in April, judge. Since that time the government has  
20       delivered to us 52 additional disks of Rule 16 material.

21               Now, in April and I believe in June, we had an  
22       April court appearance and we had a June court appearance.  
23       June 5, I believe, judge, the court made inquiry, given  
24       the fact that my client was arraigned on the indictment in  
25       November of 2013, as to the status of the Rule 16

26

1 disclosure. And the government advised the court, at that  
2 time Miss Capwell was representing the government, and I  
3 have every reason to believe it was a good-faith  
4 representation to the court, that there was about 15  
5 percent of the Rule 16 material that had yet to be  
6 delivered to the defendant.

7 Your Honor, as I recall, said: *50 percent?*  
8 Struck by the fact that perhaps it was that much discovery  
9 still outstanding. And the response was: *No, your Honor.*  
10 *15 percent.* And in June, specifically June 5, when we  
11 were talking about the next date for purposes of a status  
12 conference, a suggestion was made, actually by myself,  
13 Judge, that rather than putting it in a shorter time  
14 period where we simply report back to the court that we  
15 are still engaged in the discovery process, that we get a  
16 longer date, specifically today's date, from June 5 to  
17 September 2, in order that these discovery disputes, to  
18 the extent we were able to resolve it, could get resolved  
19 after the government completes the Rule 16 disclosure.

20 At that point I thought: *15 percent remaining?*  
21 I get that 15 percent in relatively short order. That  
22 gives me three months to absorb this material by way of  
23 conversation with my client.

24 And by the way, Judge, just so you can  
25 appreciate, and I know you are sensitive to this.

1 Whenever you have a client who is in prison, it  
2 necessarily inhibits the ability of the defendant to  
3 adequately prepare for trial, particularly in a case so  
4 heavily laden with documents as this case is.

5 So, at least from my perspective, 15 percent  
6 remaining, I get it within that three-month period and  
7 then within that three-month period I have an opportunity  
8 to review the material with my client.

9 What occurs, Judge, on a timeline is, when I  
10 receive the Rule 16 material, the disks, from the  
11 government, I review it, I download it to a standalone  
12 hard drive that I have in my office, and then I forward it  
13 along to my client through the US mail.

14 I cannot, pursuant to the rules of the Queens  
15 Private Correctional Facility, physically bring the disk  
16 to my client when I see him. I have to send them to him  
17 in advance. He then has to have the opportunity to be in  
18 the law library to view them. Once he views them, I meet  
19 with him and we go over the Rule 16 material.

20 What has transpired, Judge, is not 15 percent  
21 and not 50 percent, but based upon what I have been  
22 provided, and a great deal of which was only provided  
23 Friday of last week, Rule 16 material has not been  
24 delivered in a timely fashion. It has been delivered in a  
25 dilatory manner, Judge, from our perspective.

1                   It is absolutely critical that the defendant be  
2 given sufficient time to absorb this material. Let me  
3 give you a specific example, judge, so you have some sense  
4 as to what is involved here.

5                   By letter dated August 22, and I received the  
6 file on August 25, what occurs is, the government files  
7 its ECF letter. That is filed the same date. They then  
8 mail out the hard copy with a disk because, of course, the  
9 disks are not downloaded onto ECF. I get that a few days  
10 later. I review it and send it off to my client.

11                  So they send us, August 22, Judge, 11 disks.  
12 Eleven. One of the disks in particular had 620 megabytes  
13 of information on it. It took 11 minutes for me to  
14 download that disk onto my hard drive, separate hard  
15 drive, so that I have a copy of that Rule 16 discovery.  
16 There are 911 items on that one disk, alone.

17                  A week, less than a week, almost a week before  
18 today's court appearance, we get 11 disks. I won't go  
19 through the whole list, judge, but let me say one of the  
20 disks delivered specifically and, Judge, for purpose of  
21 the record BNK-FR-00000001 says: *Copy of CI Romanowski*  
22 *wire*, and then as I queue it up, it says *Enter Data*  
23 *Password*. So I can't access that Rule 16 discovery  
24 information until they provide the password.

25                  It appears to me, Judge, what the government did

1       is saw the deadline approaching; we need to dump a lot of  
2       Rule 16 information on the defense. And they didn't  
3       bother, judge, apparently to say: Wait a minute, we ought  
4       to review this before we send it to the defense in order  
5       that they at least have a password to access that  
6       particular disk.

7                  On one of the disks, judge, there are 28 items,  
8        4.11 megabytes of information. The first entry records,  
9        some of it is readable, yet file IPR00CR says: "*Select*  
10      *the encoding that makes your document readable,*" and it  
11      gives a whole list of selections.

12                 Perhaps the government, as they fulfill their  
13        Rule 16 obligations, Judge, when they send that kind of  
14        material to the defense, would at least give the identity  
15        of the program that you need to have in order to open up  
16        that particular document.

17                 Judge, what occurs as well is, on August 29 I  
18        received a letter. August 29 is Friday, judge. I'm sure  
19        your Honor will recall, the Friday before Labor Day. I  
20        was not in my office that day but the ECF appeared and  
21        that discovery contains 11 more disks. I know that letter  
22        because it is on ECF. I was in my office this morning at  
23        7 o'clock. I'm still awaiting those 11 disks to come in,  
24        which I have yet to receive. I will have to go through  
25        the process of downloading, and I have explained the

1 process by which my client obtains that information.

2 There is, Judge, a very significant issue from  
3 my perspective as relates to the government's delay in  
4 delivering Rule 16 material notwithstanding the extensive  
5 period of time within which the court gave them to  
6 complete this task, and that specifically, judge, has to  
7 deal with recorded conversations of my client as well as  
8 that of his codefendant, Tommy Constantine.

9 Subdivision A1A of Rule 16, the very first  
10 paragraph in Rule 16, directs the government to deliver  
11 recorded statements of the defendants. The first time  
12 after my client's arraignment in November of 2013 that we  
13 received the first recorded statement of my client on Rule  
14 16 discovery is by letter dated August of 6, 2014. And  
15 those are recorded telephone calls between my client and  
16 Mr. Constantine.

17 There is also, Judge, on that disclosure,  
18 recorded conversations between my client and Timothy  
19 Garren, who we believe to be the, as they allege,  
20 unindicted coconspirator in the indictment. There is also  
21 recorded conversations between Mr. Constantine and Nick  
22 Privitelo, who we believe to be John Doe No. 15.

23 In view of the fact, judge, that it took them  
24 from November to August to deliver the first recorded  
25 statements, and I will get to the fact that only recently

1 have we received additional recorded conversations, in  
2 view of the fact it took the government that long to  
3 deliver recorded statements which are critical to the  
4 defense -- by the way, Judge, very critical in terms of a  
5 motion that I believe is merited to be filed in this case  
6 for a Rule 14 severance due to antagonistic defenses; but  
7 in view of the fact it took so long, I filed a discovery  
8 demand, judge, that same day. And it is a rather detailed  
9 discovery demand. I would invite your Honor to take a  
10 look at it.

11 I would invite your Honor to make a  
12 determination in terms of what I ask in that discovery  
13 demand whether it is outside the statute or whether it is  
14 consistent with the statute. I am requesting 404B  
15 material be delivered. I'm requesting 807 notice be  
16 given. I'm requesting Brady material be given.

17 And I say that to your Honor because in other  
18 cases where I have filed that demand, it is routinely  
19 ignored by the government and I receive the Rule 16  
20 discovery in due course, I have an opportunity to review  
21 the Rule 16 discovery, I'm able to do my due diligence in  
22 accordance with Fry and Laufer and make a recommendation  
23 as to my client which lots of times results in a plea.

24 So it doesn't become an issue in that kind of  
25 scenario, judge. It is here because this case is going to

1 trial. It is an issue here because Mr. Kenner will not be  
2 entering a plea of guilty at any point in time to any part  
3 of the indictment.

4 What we have had occur since then, judge, is, we  
5 have had additional disclosure of telephone calls from the  
6 prison, recorded by Mr. Constantine, by letter dated  
7 August 28. I have yet to receive that. I did receive, as  
8 I went to my office this morning, the agent notes  
9 reflecting statements made by Mr. Constantine and calls,  
10 emails made by Mr. Constantine August 27, August 28,  
11 Judge. I received the agent's notes reflecting statements  
12 made by Kenner during the interview on June 24, 2009.  
13 Calls obtained from prison facilities based under PK calls  
14 1 through 7 and related records.

15 Judge, how does it take the government from  
16 November 2013 to August of 2014 to deliver recorded  
17 statements that were clearly in their possession as far  
18 back as 2009?

19 Judge, why do I bring that to your Honor's  
20 attention? Because my position, judge, in terms of  
21 ongoing discovery, is this. The government has in its  
22 possession my letter dated August 14, 2014, wherein I make  
23 specific requests for Rule 16 material. I asked the  
24 government respond paragraph by paragraph to each request.  
25 To the extent that they have already provided all the

32

1 recordings, then they simply may answer that August 14,  
2 2014, discovery demand by way of that response. And here  
3 is why it is critical, judge.

4                 Based upon the recordings that I have received  
5 to date, I don't even know if they are complete at this  
6 point, Judge. Based upon the recordings that I have  
7 received to date and the statements I have received from  
8 my client, purportedly from my client, as well as  
9 Mr. Constantine, there is from my perspective, judge, an  
10 antagonistic defense such that severance has to be  
11 warranted because in these calls what you hear is, you  
12 hear Mr. Kenner accusing Mr. Constantine of misdeeds; you  
13 hear Mr. Constantine accusing Mr. Kenner of misdeeds. It  
14 is that type of antagonistic defense, Judge, that exists.  
15 And indeed, in my opening statement to the jury I may very  
16 well, and likely will be adverse to the interests of  
17 Mr. Constantine, stepping in the shoes of the prosecutor  
18 during my opening statement. So that is why it is  
19 critical.

20                 But Judge, how do we begin to even address,  
21 let's say, filing a date for motions until the Rule 16  
22 disclosure has been complete? For one of those very  
23 reasons.

24                 You know, Judge, while I hope I still have your  
25 Honor's attention. As far as the subpoenas are concerned,

1       Let me at least state on the record my position. Rule 17  
2       allows my client the right to seek subpoenas of third  
3       parties for purposes of obtaining information material to  
4       his defense. And that is how the statute reads.

5              I'm familiar with *United States v Nixon*. *United*  
6       *States v Nixon* is clearly distinguishable from this case,  
7       judge.

8              *United States v Nixon* involves an instance where  
9       the federal government served subpoenas on Richard M.  
10      Nixon --

11             THE COURT: I don't want to go through the Nixon  
12       case. I'm familiar with it.

13             But Rule 17, whatever subpoenas, whatever motion  
14       you want to make, I have already told you you can file  
15       that whenever you are ready. So I don't want to go back  
16       to that.

17             MR. HALEY: Very well.

18             THE COURT: Mr. Conway, do you have any Rule 16  
19       issues?

20             MR. CONWAY: The issue I have, your Honor, is  
21       the fact that, and Mr. Haley covered it, in the last  
22       roughly three weeks, it might be three and a half weeks, I  
23       have gotten seven different discovery letters and my  
24       estimation is about 60,000 pages of documents and about 30  
25       hours of phone calls.

1           I don't have a specific motion to make on them  
2 but that is going to take some time to go through. So I  
3 think we are going to need again a lengthy period, judge,  
4 before we can set a motion schedule.

5           And I think Mr. Haley is correct, from what I  
6 have heard so far, and I have only scratched the surface,  
7 it seems to be a very real and legitimate set of motions  
8 that are going to be made here.

9           THE COURT: Let me hear from the government. I  
10 want to understand a little more why the volume of  
11 discovery is so high at this point versus, I guess, what  
12 Miss Capwell had thought previously.

13           MS. KOMATIREDDY: I'm happy to address that,  
14 your Honor. Let me just go back to the timeline a little  
15 bit.

16           I understand the last status conference in this  
17 case was in June of this year. At that time AUSA Capwell,  
18 defense counsel is correct, estimated that there was  
19 approximately 15 percent of discovery remaining.

20           Also at that time the government received a  
21 number of additional documents. We received a number of  
22 additional boxes from the Southern District of New York  
23 more recently. In an effort to review all documents that  
24 we believed were relevant and carry out our discovery  
25 obligations in a diligent manner, we received documents,

1 requested to receive documents, from the Securities and  
2 Exchange Commission.

3 Given that additional volume, that was not taken  
4 into consideration in AUSA Capwell's estimate at that time  
5 when she may have given only the documents before her at  
6 that time. Since June, when AUSA Miskiewicz and I have  
7 taken over this case, we have done our best to conduct our  
8 discovery review in a diligent manner, at the same time  
9 reading up on this case.

10 There are a couple of specific items that I do  
11 want to address from Mr. Haley's argument. First, the  
12 frequency of discovery letters is simply a product of our  
13 trying to review and get out discovery as soon as we are  
14 believe to review it. So that there is no delay in  
15 actually handing discovery over from the government to the  
16 defense.

17 I'm not sure the number of disks is as  
18 relevant as just the amount of material. A huge amount of  
19 material, specifically the August 22 letter that Mr. Haley  
20 references which included a production of four disks that  
21 contained approximately 60,000 pages of documents, was  
22 material that was produced in response to Mr. Haley's  
23 request.

24 Mr. Haley specifically requested documents that  
25 had been produced to the Southern District of New York by

1                   counsel for Kenneth Jowdy. We obtained those documents.  
2                   Although we do not agree with Mr. Haley's representation  
3                   of those documents as Brady material, out of an abundance  
4                   of caution and in order not to unreasonably delay Rule 16  
5                   discovery, we simply turned them over.

6                   In that same vein, Mr. Haley complains that  
7                   there was a password missing in these letters. I think  
8                   your Honor will notice if you review the letters, whenever  
9                   there is a password required, the government does provide  
10                  a password. In fact the very password that Mr. Haley  
11                  complained of in the August 22 letter it states: *For FR1*  
12                  *the password is*, and it lists the password, which I won't  
13                  put on the record. But it is in the ECF filing. So I'm  
14                  not sure.

15                  THE COURT: All right, let me ask two questions.

16                  First, why did it take so long to produce the  
17                  recorded conversations? I would think that they would  
18                  have been prioritized.

19                  Why did they take so long?

20                  MS. KOMATIREDDY: Your Honor, I turned them over  
21                  as soon as I received them.

22                  There are some recorded conversations that we  
23                  are receiving from victims. There are some -- and I will  
24                  say that we are, I still have a few that I have to turn  
25                  over later today.

1                   We ran into our own issues in terms of age of  
2 computers having had data deleted and having to reacquire  
3 those recorded conversations. We acquired other data and  
4 emails that had been sent to us. As soon as we got those  
5 the last few weeks, we pulled out those recorded calls and  
6 sent them over.

7                   We are still awaiting some jail calls from the  
8 jail facility, which we will turn over as soon as we  
9 receive them.

10                  And, as I said, we are attempting to meet these  
11 obligations as diligently as possible. As a first pass,  
12 we are attempting to review the material, and to the  
13 extent that there is a number of material that is Rule 16  
14 and not Rule 16, early 3500, we have decided, in order not  
15 to hold up Rule 16 discovery, to simply turn over that  
16 material wholesale since the defense at the end will get  
17 it anyway.

18                  So we are doing our best, your Honor. As a  
19 good-faith estimate, I can state that, just to correct the  
20 record, Mr. Haley said that the first recorded  
21 conversation received was August 6. That is actually not  
22 true. Miss Capwell turned over a recorded conversation  
23 between these two defendants on February 10 of this year.  
24 That is reflected in the record and is in the discovery  
25 letter.

1                   So the recorded conversation that she had, she  
2 turned over. And as I have continued to receive them, I  
3 have turned it over. Our expectation at this point is to  
4 hand over additional discovery later today. And we are  
5 still awaiting some documents from the SEC. We are  
6 awaiting some documents, as I said some jail calls, from  
7 BO. And we are currently processing the review of a  
8 number of emails that require redaction. We expect to  
9 have all of that out within the next week.

10                  THE COURT: So basically you think that any  
11 remaining Rule 16 would be completed by the end of next  
12 week.

13                  MS. KOMATIREDDY: Yes, your Honor.

14                  THE COURT: All right. Other than privileged.

15                  MS. KOMATIREDDY: Yes, other than privileged.

16                  THE COURT: I understand that.

17                  Go ahead, Mr. Haley.

18                  MR. HALEY: As relates to the government's  
19 explanation as to the difficulties that they have  
20 encountered in providing from my perspective Rule 16  
21 disclosure.

22                  Agent Galiano, who is present in the courtroom,  
23 has been the special agent in charge of this investigation  
24 for some period of time. He was in charge of the  
25 investigation, I should say participated in the

1 investigation, when my client was first investigated by  
2 the Securities and Exchange Commission.

3 He was, as best I know, the Special Agent in  
4 charge who participated in the investigation when it was  
5 first investigated by the US Attorneys office for the  
6 Southern District of New York presumably, judge, which was  
7 then presented to a grand jury in 2011.

8 Having listened to two of the witnesses who will  
9 be testifying in this case, two John Does, Mr. Berard and  
10 Mr. Sidor, definitively decided that they would not  
11 proceed any further with either the investigation or  
12 indictment of my client, Mr. Galiano picked up his file  
13 and came here to the Eastern District and presented his  
14 file to the Eastern District. That is why we are here  
15 today.

16 So to suggest that somehow there has been this  
17 difficulty in obtaining this information, from my  
18 perspective, Judge, based upon what I know, this body of  
19 information has been in the possession of the government  
20 for some period of time.

21 When the government says we encountered a  
22 difficulty in terms of the agent's laptop computer, some  
23 files were deleted and we have to reconstitute those  
24 files, judge, that doesn't give me great assurance that my  
25 client's laptop will be handled in any better fashion.

41

1 I'm sure it will be, Judge. Let me explain, judge. One  
2 final comment.

3 In the August 29 letter, the first page, as they  
4 explain to your Honor how from their perspective they have  
5 abided by, I think it was at your Honor's direction, that  
6 discovery proceed in an expeditious fashion. They write  
7 in the first page, also on June 25, 2014, generally  
8 reflected that the government identify documents created  
9 by the defendants which contained forged signatures.

10 On August 29, 2014, the government identified  
11 such documents and provided them to the defense. Again,  
12 Judge, this is the August 29 letter.

13 Why are the forged documents relevant? I think  
14 your Honor knows why forged documents are relevant. If  
15 they exist, they exist. If they don't exist, that's  
16 relevant to the defense, judge.

17 As a matter of fact, whether or not they are  
18 forged or not, the defendant has a right to take a look at  
19 the documents, perhaps conduct additional discovery by way  
20 of Rule 16 subpoenas to get all the records that surround  
21 the creation of those documents to address the forgery.  
22 The defendants may, Judge, want to engage an expert  
23 witness to take a look at the alleged forged documents to  
24 address that by way of expert testimony.

25 But on June 25 I made a demand, and on August

1       29, last Friday, they finally identify it? When, in a  
2 bail application letter to your Honor in November they  
3 cite the forged document as one of the reasons why your  
4 Honor ought to detain my client. They had been in  
5 possession of it since November and they provided them  
6 last Friday?

7                  Judge, you know, I have yet to receive them  
8 because, once again, this letter is dated August 29. I  
9 have yet to receive the hard copy. I have yet to receive  
10 the disk. Once I receive the disk, I will be able to take  
11 a look at these alleged forged documents. It is going to  
12 be some period of time before I'm going to be able to  
13 significantly investigate the allegations as relate to the  
14 forged documents, given late disclosure.

15                  Thank you, judge.

16                  THE COURT: Okay. Obviously for this  
17 conference, although I have seen back and forth in the  
18 discovery, this is the first time these issues are being  
19 raised with the court. And I'm prepared obviously to have  
20 more strict supervision of the discovery process if the  
21 defense has any issues with the government's timeliness or  
22 their responsiveness in terms of the scope of what is  
23 being asked for.

24                  But prior to this time, I just assumed that all  
25 the lawyers were working out those differences amongst

1       themselves, and that is why I set it down, as you  
2       requested, for a long period of time for the remaining  
3       discovery to be produced.

4                  I don't believe anything that I have heard is  
5       any indication that the government has operated in bad  
6       faith or is withholding discovery or delaying discovery  
7       for any strategic reason. Obviously, this is a complex  
8       case. There are a lot of documents, a lot of discovery,  
9       and the government is producing it on an ongoing basis.

10                 In terms of moving forward, the government has  
11       represented that the Rule 16 discovery is going to be  
12       completed by the end of next week. And I'm going to ask  
13       the government to respond to Mr. Haley's letter, whatever  
14       he is requesting in that letter, whether they have already  
15       produced it or they don't believe that they need to  
16       produce at this time, so that Mr. Haley, to the extent  
17       that he believes that your response is inadequate, can  
18       then file a motion with the court.

19                 Again, typically the lawyers work out the timing  
20       of any Rule 404(b) disclosures by the government, but if  
21       you cannot reach agreement on those types of issues, then  
22       Mr. Haley can make a motion with the court.

23                 So the government is going to produce any  
24       remaining discovery in its possession by September 12,  
25       Rule 16 discovery that is, and respond to Mr. Haley's

1 Letter by the 19th of September.

2 I will be guided by the defense in terms of how  
3 you want me to -- obviously, Mr. Haley, once you get that  
4 letter, I can set a schedule for a motion. But in terms  
5 of discovery motion, if you want, I can put it down for  
6 another conference in 30 days, and you and Mr. Conway can  
7 decide how you want to proceed in light of what has  
8 transpired today and what dates I have set.

9 What would you like to do?

10 MR. HALEY: Thank you.

11 My request would be that we set a status  
12 conference date and report on these issues 30 days from  
13 today. Keep it on a tight line.

14 THE COURT: Fine.

15 MR. HALEY: Thank you, sir.

16 THE COURT: Thursday, October 2, at 1 o'clock.

17 MR. MISKIEWICZ: Your Honor, I have to appear  
18 before the Second Circuit that morning. I would like to  
19 be here on that date.

20 THE COURT: Do you want a different date, then?

21 MR. MISKIEWICZ: I would ask for a different  
22 day.

23 THE COURT: October 3?

24 MR. CONWAY: I'm going to be out of town on the  
25 third.

1                   THE COURT: October 6. Monday.

2                   MR. CONWAY: I am gone that Friday and Monday,  
3 judge. I can do the 7th.

4                   THE COURT: The 7th at 1 o'clock.

5                   MR. MISKIEWICZ: Thank you, your Honor.

6                   MR. HALEY: That works, judge.

7                   THE COURT: If you can, have your client execute  
8 the speedy trial waiver to that date.

9                   MR. HALEY: Yes, sir.

10                  THE COURT: For grounds, just put review of  
11 discovery.

12                  MR. CONWAY: Judge, both counsel and defendants  
13 have executed the waiver and I'm providing it to  
14 Mr. Miskiewicz.

15                  THE COURT: Okay. Mr. Kenner and Mr.  
16 Constantine, you have heard what we have discussed today.  
17 The government is going to complete the Rule 16 discovery  
18 by the end of next week and is going to respond to  
19 Mr. Haley's discovery letter. And we are going to have  
20 another conference October 7 to discuss hopefully a trial  
21 date and a date for any motions that your lawyers want to  
22 make on your behalf.

23                  By signing this waiver, you are agreeing to  
24 exclude the time under the Speedy Trial Act until August 7  
25 for that purpose.

1                   Is that what you want to do, Mr. Kenner?

2                   MR. KENNER: October 7, your Honor?

3                   THE COURT: Yes.

4                   MR. KENNER: Yes, your Honor.

5                   MR. CONSTANTINE: Yes, your Honor.

6                   THE COURT: Any objection to me inserting as  
7 grounds the review of discovery?

8                   MR. HALEY: No, sir.

9                   MR. CONWAY: No objection, your Honor.

10                  THE COURT: I am inserting "*review of*  
11 *discovery.*" No objection?

12                  MR. HALEY: No, sir.

13                  MR. CONWAY: No, sir.

14                  THE COURT: Pursuant to that request, we will  
15 calendar the case for October 7, at 1 pm, for a status  
16 conference.

17                  I'm excluding the time from today until October  
18 7 in the interests of justice under Title 18, United  
19 States Code, Section 3161H7A, in order to allow the  
20 defendants and their counsel to continue to review the  
21 voluminous discovery, both that they have received and the  
22 additional discovery they are going to receive over the  
23 next two weeks, and for them to decide what motions they  
24 want to make and how they want to proceed with respect to  
25 the defense of the case.

1           I find that the interests of justice served by  
2 granting the continuance outweigh the best interests of  
3 both the public and the defendants in a speedier trial,  
4 and I so order the waiver.

5           Obviously, if any additional issues come up  
6 between now and then, you can always write the court  
7 before that date. But I assume if there are any remaining  
8 issues regarding passwords or things of that nature, the  
9 government will provide them.

10          And obviously the government, within a week from  
11 today, could just send me a letter on the computer issue  
12 at the jail, telling me whether or not they found a way to  
13 deal with that issue. I don't want to wait until the next  
14 conference to deal with that. Okay?

15          MR. MISKIEWICZ: Yes, your Honor.

16          MR. HALEY: Judge, a final issue, as relates to  
17 the Rule 17 subpoenas.

18          From my reading of the statute, it appears to me  
19 the defendant in this instance has an opportunity to make  
20 an ex parte application to the court. Is your Honor  
21 directing that it be done by way of motion, which  
22 obviously is not ex parte, then has disclosure to the  
23 government?

24          THE COURT: No. It can be by way of a motion.  
25 An ex parte motion.

1 MR. HALEY: I am sorry, judge?

2 THE COURT: An ex parte motion to me as to why  
3 it is appropriate. And within that you would justify why,  
4 even though it is ex parte, but explain why I shouldn't  
5 give notice to the government. Okay?

6 MR. HALEY: In that regard, and I think your  
7 Honor will appreciate it, the difference between Rule 16  
8 and Rule 17, it speaks for itself. But to the extent that  
9 I receive Rule 16 material, and hopefully now we have some  
10 sort of deadline, I'm not going to request, by way of Rule  
11 17 subpoenas, what I have already received. Then the  
12 government clearly has the standing to address that Rule  
13 17 subpoena.

14 But I want the court to understand my position  
15 now. It is not my intention to get what I have already  
16 received from Rule 17.

17 THE COURT: No. I understand that. I assume  
18 you wouldn't ask for similar material again. But often  
19 they are submitted ex parte and I decide them ex parte,  
20 depending upon what is being requested.

21 So in the first instance you can submit them ex  
22 parte, and if I believe it is an appropriate response from  
23 the government, I will let you know before I do that so  
24 that you can be heard.

25 MR. HALEY: Thank you, your Honor.

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1                   THE COURT: Any other issues that anyone wants  
2 to address?

3                   I would ask the government, so we don't have  
4 problems later on, to make sure that if you haven't done  
5 so already, that you canvass all the victims that you are  
6 relying on in this case to make sure they have no  
7 additional recorded conversations or other Rule 16  
8 materials in their possession, because I don't want to  
9 have a situation where a victim shows up with some box of  
10 recordings or other items three months from now. So, if  
11 you could, canvass the victims on that.

12                  MS. KOMATIREDDY: Yes, your Honor.

13                  THE COURT: Anything else from the defense?

14                  Thank you. Have a good day.

15                  (Proceedings adjourned at 3 pm.)

16

17                  CERTIFICATE OF COURT REPORTER

18                  I certify that the foregoing is a correct transcript from  
19 the record of proceedings in the above-entitled matter.

20

21                  Dominick M. Tursi, CM, CSR

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